CITIZEN COMMENT: DRAFT MASTER PLAN FRAMEWORK

DATED: 28 FEB 2005

LEGAL ISSUES:

1. PROGRAM EIR AND TIERING

An environmental impact report (EIR) is required under the California Environmental Quality Act (CEQA) whenever a government agency project will have a significant impact on the environment. Large scale projects having many elements ordinarily call for a 'program EIR' and tiering of subsequent EIR's for each phase or element of the overall project. California Public Resources Code § 21065; CEQA Guidelines § 15378, subd. (c); see generally ***Al Larson Boat Shop, Inc. v. Board of Harbor Commissioners*** (1993) 18 Cal.App.4th 729, 740. The purpose of an EIR is to inform government decision making before the decision is made. ***Laurel Heights Improvement Assn. v. Regents of University of California*** (1988) 47 Cal.3d 376, 392. Thus the basic standard for whether an EIR is required before approval of a project (i.e., adoption of the Master Plan for implementation of the Marine Life Protection Act [MLPA]) is whether the project, taken together or as to any individual part, arguably will have an adverse environmental effect. ***No Oil, Inc. v. City of Los Angeles*** (1974) 13 Cal.3d 68, 85-86. The existence of a significant public controversy is an important indication an EIR may be required "to demonstrate to an apprehensive citizenry that the agency has in fact analyzed and considered the ecological implications of its action." ***Id.***; ***San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus*** (1996) 42 Cal.App.4th 608, 617-618.

Under CEQA, if a project may have a significant effect on the environment, an EIR is required. California Public Resources Code §§ 21100, 21151; CEQA Guidelines, §§ 15080, 15084. "Significant effect on the environment" means "a substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the activity including land, air, water, minerals, flora, fauna, ambient noise, and objects of historical or aesthetic significance." CEQA Guidelines, § 15040; § 21068. "Environment" is defined as "the physical conditions which exist within the area which will be affected by a proposed project ...." California Public Resources Code § 21060.5; CEQA Guidelines, § 15026. Presumably, if the scope of the Master Plan is statewide the "area which will be affected" that must be considered is the entire California coastline and adjacent waters. Subsequent tiered EIR's for individual Marine Protection Areas (MPA's) would have a site specific scope under CEQA Guideline § 15378, cited above.

Effect on the environment includes both direct and indirect effects. "Direct and indirect significant effects of the project on the environment shall be clearly identified and described, giving due consideration to both the short-term and long-term effects." CEQA Guidelines § 15126.2 (a). An EIR must consider "reasonably foreseeable" secondary consequences of project approval. CEQA Guidelines § 15064 (d).

In practical and legal terms, an EIR is required if a "fair argument" can be made to support a conclusion adverse direct or indirect environmental effects may occur as a result of approval of a project or any of its parts. ***Architectural Heritage Assn. v. County of Monterey*** (2004) 122 Cal.App.4th 1095, 1109-1110 *and authorities cited;* ***Quail Botanical Gardens Foundation, Inc. v. City of Encinitas***

(1994) 29 Cal.App.4th 1597, 1601-1603; ***Citizens of Goleta Valley v. Board of Supervisors*** (1990) 52 Cal.3d 553, 563-564. Among other criteria, an EIR is required whenever a proposed agency action has the potential to interfere with other existing environmental protection programs.

Under CEQA, it is the responsibility of the lead agency (here California Department of Fish and Game) to determine whether an EIR shall be required. Public Resources Code, § 21165. This entails a preliminary review to determine whether the project is subject to CEQA and, if so, whether an exemption applies, followed by an initial study to determine whether the project may have a significant effect on the environment under the above "fair argument" standard. CEQA Guidelines, §§ 15060-15063.

The premise of this comment is the Commission, Panel, Science Team and lead agency cannot lawfully take further action unless and until the above initial study is done and a project EIR prepared because the MLPA and any MPA's designated under it, to the extent they will entail a restraint upon the take of fish commercially or recreationally or both, will have a significant adverse effect on the environment directly, indirectly, and by interfering with existing environmental protection programs.

A. Human economic and social indirect impacts.

A lead agency is required to consider in an EIR the socio-economic impacts of a project where it may lead to rural or urban blight or other physical consequences. CEQA Guideline § 15131(a); ***Citizens for Quality Growth v. City of Mt. Shasta*** (1988) 198 Cal.App.3d 433, 445-446; ***Christward Ministry v. Superior Court*** (1986) 184 Cal.App.3d 180, 197. In the context of the MLPA, the issue is whether the loss of recreational access and fishing take due to creation of MPA's will entail local area depression and blighting of harbor, wharf, storage, and docking facilities associated with commercial and/or recreational use, as well as depression and blighting as a result of the loss or reduction of associated business activity such as engine repair, fishing tackle, diving and other retail sales, and local area housing shore-side of MPA's within the system.

As a concomitant, it has been suggested that eco-tourism will be promoted by the creation of MPA's. Where these coincide with existing commercialized districts within urban settings, growth of eco-tourism may create demand for coastal development of commercial (hotel-motel, shop, restaurant, etc.) development to meet the demand, creation or improvement (e.g., building or re-building, dredging or re-dredging) of harbor facilities to accommodate craft (e.g., dive boats, whale watching boats) intended to meet demand with manifold effects on public safety, traffic, air, water and other resources within the costal zone. Further, creation of MPA's in areas outside existing urban environs may contribute to urban sprawl and the creation of similar commercial growth in otherwise undeveloped areas of coastline for the same reason of meeting demand for eco-tourism.

"May" in this context is used in the legal sense under CEQA of "reasonably possible" or "likely to occur" where possible not probable is the standard for preparation of an EIR. Thus because such indirect consequences of creating a network of MPA's are reasonably likely to occur an EIR is required by law.

B. Indirect impacts on fisheries outside MPA's.

It is reasonably foreseeable that a reduction in the area of available waters open for commercial or recreational fishing may increase the rate of use of waters outside closed MPA waters. An often cited statistic holds California has the fifth largest economy on earth. There is a tremendous demand for seafood in this economy, a demand that is growing rather than declining, due among other reasons to the actual or perceived health benefits of seafood. In consequence the closure of waters to fishing by creation of MPA's may force commercial production to meet this demand to increase in areas that remain open to commercial fishing. A similar pattern can be foreseen for recreational take of fish and mollusks, or other recreational activity such as diving, whale watching and the like.

I may be possible to narrowly the definition of project area under the MLPA to create an artificial distinction in such a way as to aver no impact of an uptake in fishing pressure outside an MPA on certain non-migratory species (e.g., cabazone, some rockfish), but the distinction cannot be shown scientifically. That is, the ocean is a continuum of life zones in physical as well as ecological terms. Thus a myriad of biota are carried into and around the habitat of territorial species by currents and upwelling flows and their larvae must migrate to establish new territories, just to mention two examples. Thus it is reasonably foreseeable what occurs outside the artificially created boundaries of an MPA, particularly increased fishing or recreational pressure, will have indirect impacts within the MPA even on non-migratory species.

Even more obvious may be the effect of increased pressure outside an MPA on migratory species that are present within a given boundary for only part of a climatic or a life cycle. Many juvenile deepwater rockfish rear in near-shore habitat, especially the bottom in kelp forest habitat, and migrate into deeper water and reefs as they mature (intriguing color phases are a part of this cycle). But they are not significant in the commercial or recreational catch as juveniles. Thus another example of a foreseeable potential consequence of increased pressure outside MPA boundaries may be a cropping effect on year class fishes migrating beyond the legal line to habitat typical of adults along the boundaries of an MPA. A rebound effect of increased survival might also occur within an MPA, enhancing nearby commercial or recreational pressure from anglers or divers. Yet other rebound effects may be a migration effect of species from outside MPA, increased predation of juveniles within an MPA due to increased survivability and growth of non-migratory fish species, increased predation or migration by marine mammals attracted to an MPA, reduction of prey species by the juveniles, and so on.

Although some of the examples suggested are better addressed in the selection and design of individual MPA's by the Science Advisory Team, it would be sophomoric logic to assume merely because an MPA or system of MPA's is created with good intentions it can't have secondary adverse effects that are foreseeable and mitigable. One purpose of an EIR after all is to rationally address alternatives and mitigation of adverse effects and an EIR is required in this instance.

C. National and international effects.

The MLPA is unprecedented, especially to the degree it contemplates a systematic approach to setting aside public waters and substrate for protection on a statewide basis and on a large scale. But this also entails a substantial degree of NIMBY-ism. That is, the not-in-my-back-yard approach to resource management merely shifts the adverse effects of taking resources out of production somewhere else. As mentioned, California has the fifth largest economy in the world with the fifth largest consumer demand

for ocean products, from sole to kelp derived nutritional supplements to tourist attractions such as aquariums. While the issues are multi-faceted, for simplicity just commercial demand to meet retail and restaurant human consumption is considered here.

One issue the Commission must take a "hard look" at (in the federal environmental impact statement sense), are the potential consequences on national and international fisheries of taking large areas of California's waters out of commercial production and thereby creating a demand vacuum in the California economy. Obviously the initial effects would be a short term "boom" for commercial producers fishing waters not within the MPA system. However, as either local stocks are depleted or regulation increases or both, scarcity and demand will act to increase prices and attract supply from non-California waters. In practical terms, taking market fish production out of California's back yard will result in an increase of demand from elsewhere, primarily Mexico, Hawaii, and Alaska as to "fresh" fish and the East Coast as to farmed salmon. But it would be unlikely to stop there—if the system of MPA's is large enough and thus unsatisfied demand is large enough, a host of unregulated ('piratical') long liners and seiners may crowd international waters and sweep the seas to meet the demand created by the vacuum in supply.

Depletion by unregulated offshore fisheries outside California is not the sole foreseeable consequence. Indirect effects such as heightened risk of introduction of invasive species (including pathogens) as a result of increased out of state ship traffic is another, as is devastation of the economies of indigenous fishing communities elsewhere as a result of unregulated or under-regulated depletion of out of state resources. In short, it would be irresponsible to suppose that taking large areas of the state's waters out of production will not have serious and ongoing effects outside California.

A reverse example is the California sea urchin. In a recent and well documented cycle, a boom market developed because of a lack of supply in Japan for sea urchins, a part of which is processed for consumption as a sushi item. The high prices attracted producers here in California which had a relatively unexploited supply. The boom lasted long enough to devastate the local sea urchin population, even with regulation of the take, especially north of San Francisco. This general economic effect can be expected to recur in reverse to meet seafood demand in California if a system of MPA's restricts supply for consumption to any appreciable degree with similar effects on out of state fisheries.

Although the foregoing may seem to be an argument for sustainable yield where production can at least be supervised under our environmental standards (and it is that), the point is that the California economy is so large that agency actions here have foreseeable and significant effects nationally and internationally that must be addressed in an EIR.

2. Article 1 § 25 of California Constitution

The following discussion relates to the rule of law that an initiative, however well intended, is invalid to the extent its provisions conflict with either the California (***Hotel Employees & Restaurant Employees Internat. Union v. Davis*** (1999) 21 Cal.4th 585, 589) or U.S. Constitution. ***Bramberg v. Jones*** (1999) 20 Cal.4th 1045, 1055-1056.

The Draft document refers to the 'right to fish' and includes commentary that appears to be based on a gloss of two legal opinions, ***California Gillnetters Assn. v. Department of Fish & Game***

(1995) 39 Cal.App.4th 1145 and ***People v. Monterey Fish Products Co.*** (1925) 195 Cal. 548. The conclusion that fishing rights are de minimis under the law is simply wrong. That is, the obvious is correct that inclusion of the right in a separate section of the Constitution indicates it is an important right retained by the people albeit subject to regulation. Indeed, the opinion in ***People v. Monterey Fish Products Co.***, 195 Cal. at 557, contains the following explanation:

"The policy of this state in its relation to the food fish within its waters has been clearly, consistently, and unmistakably manifested throughout the history of its fish and game legislation. It aims at the protection and conservation of the food fish for the benefit of the present and future generations of the people of the state and the devotion of such fish to the purpose of human consumption."

It is this statement that explains the decision, which upheld the authority of the Fish and Game Commission to impose quotas on canneries for the use of fish fit for human consumption for purposes of reduction into fertilizer and fish oil. Because of the age of this case, and vast changes in the law since the decision was rendered, there are limits to its value as precedent. For one, in the discussion relevant to the point included in the Draft Document (195 Cal. at 563), the California Supreme Court relies on a U.S. Supreme Court case, ***Greer v. Connecticut***, which has limited current authority. The legal fiction that the States "own" wildlife is supplanted by the Public Trust Doctrine at modern law. E.g., ***State of California v. Superior Court*** (Lyon) (1981) 29 Cal.3d 210, 214; ***National Audubon Society v. Superior Court*** (1983) 33 Cal.3d 419, 434-435; ***California Trout, Inc. v. State Water Resources Control Bd.*** (1989) 207 Cal.App.3d 585, 630. Thus any analysis relevant to the legal basis for the Draft Document or any of its elements needs to be re-addressed in modern terms.

Another ancient case in this line is ***Ex parte Maier*** (1894) 103 Cal. 476, 483, which contains the statement:

"The wild game within a state belongs to the people in their collective, sovereign capacity; it is not the subject of private ownership, except in so far as the people may elect to make it so; and they may, if they see fit, absolutely prohibit the taking of it, or any traffic or commerce in it, if deemed necessary for its protection or preservation, or the public good."

This case is weak authority for an absolute ban on fishing or regulation that amounts to a ban. For one, the case dealt with sale of venison and had nothing to do with fishing. And, importantly, it antedates the enactment of Art.1 § 25 as well as the more recent Art. 1 § 26 (enacted in 1978). The latter provides:

"The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise."

The latter is in effect a "strict construction" provision that limits the scope of judicial interpretation of the California Constitution. All prior cases must thus be re-evaluated for consistency with this provision since the law is enforced in a "top down" manner with the Constitution at the apex and new rules at the top can render older opinions obsolete and recast the interpretation of the Constitution itself as was the obvious intent in adding Art.1 § 26 to the law.

Article I, section 25 of the California Constitution declares: "*The people shall have the right to fish upon and from the public lands of the State and in the waters thereof,* excepting upon lands set aside for fish hatcheries, and no land owned by the State shall ever be sold or transferred without reserving in the people the absolute right to fish thereupon; and no law shall ever be passed making it a crime for the people to enter upon the public lands within this State for the purpose of fishing in any water containing fish that have been planted therein by the State; *provided, that the Legislature may by statute, provide for the season when and the conditions under which the different species of fish may be taken.*" (Italics added.)

Reading the italicized portion by itself, "*The people shall have the right to fish upon and from the public lands of the State and in the waters thereof . . . ; provided, that the Legislature may by statute, provide for the season when and the conditions under which the different species of fish may be taken.*", it is patently obvious a strict construction consistent with Art.1 § 26 makes this a prohibitory law. "Shall" is interpreted to indicate 'must' or 'required' in statutory interpretation, so that there is no discretion to limit the right given except the language following "provided."

Thus ***Ex parte Maier*** to the extent it can be interpreted to support a ban on fishing (except pursuant to the reserved right to regulate "the conditions" of take), was superceded by both Art.1 § 25 and § 26. In other words there is a limit to the scope of "regulation by MPA" under Art.1 § 25.

The other case referred to by implication in the Draft Document, ***California Gillnetters Assn. v. Department of Fish & Game*** (1995) 39 Cal.App.4th 1145, fails to consider the effect of Art.1 § 26 on prior precedent antedating 1978 and, leaving aside the issues relating to the initiative process, basically only holds that gillnets are gear and gear can be regulated even with a ban which results in the loss of livelihood of fishermen fishing exclusively with gillnets. Not only is this consistent with the 'post-provided' language of Art.1 § 25 there is no language supporting a ban on any type of fishing in the case. Seen as yet another case upholding the regulation of the take of fish, it breaks no new ground.

Further, ***California Gillnetters*** relies principally on ***Paladini v. Superior Court*** (1918) 178 Cal. 369, in construing the scope of Art.1 § 25. ***Paladini*** (178 Cal. at 372) contains the statement referring to Art.1 § 25 that, "This section gave no right to the people which they did not already have." This conclusion is debatable at best in light of Art.1 § 26 if alleged to impair the right to fish, but is clearer in context. That is, the case held a statutory scheme for price supports for sales of fresh fish was constitutional in a case dealing with enforcement of a business records subpoena. Thus the defense based on Art.1 § 25 was the "stretch" and the opinion really doesn't have much to do with fishing per se, only marketing and judicial process to the extent it held the records had to be turned over to the administrator setting prices. The other citations relating to upholding the gear restriction in ***California Gillnetters*** relate to state "ownership" of fish, which per above is a dubious legal fiction in modern law.

To sum up, there is no question it is well settled law that fishing can be regulated and that the right to fish conferred (or, per ***Paladini***, restated) in Art.1 § 25 must be exercised subject to the qualifying language contained in the 'post-provided' language of that section. However, because the right given is expressed in language that is absolute ("shall") it must be strictly construed pursuant to Art.1 § 26. Therefore Art.1 § 25 is a limitation on the ability of the Commission to ban fishing by creation of MPA's. It can be validly argued, even, that Art.1 § 25 limits the Commission to regulating the season, manner and method of take only and that expansion of regulation at the expense of the

exercise of the right is prohibited. The ultimate issue is whether the administration of the MLPA is to be based on finding ways to circumvent a Constitutional guarantee or based on a recognition and respect for that right. The former path is very likely to lead to the courthouse; the latter to "protection and conservation of the food fish for the benefit of the present and future generations . . . and the devotion of such fish to the purpose of human consumption" by a cooperative effort.

3. Lack of an Exit Strategy

The most obvious fault of the Draft Document or the existing plan for implementation of the MLPA and selection of MPA's is the absence of an "exit strategy" or mechanism for assessing levels of recovery and thus de-regulation of MPA's. The MLPA specifically references "recovery" and "restoration" and thus at a minimum there must be objective, measurable and specific criteria utilized not only for both assessing 'degradation' of stocks or habitat but recovery and restoration as well. If the purpose of an MPA is to accomplish recovery of stocks and restoration of habitat then at some point a determination needs to be made whether the goal is achieved or unattainable and a further determination made whether to persist in the regulatory scheme or some part of it for that MPA.

In practical terms, the level of restraint on access, take and other use within MPA's should reflect the degree of recovery and restoration over time and be subject to periodic review and adjustment. Degradation at the outset cannot rationally be a permanent basis for continued high levels of such restraint after whole or partial recovery and restoration within the MPA or network of MPA's.

The lack of an exit strategy or de-regulation plan tends to suggest that the MPA's will be permanent. If that is intended, then the Draft Document needs to clearly state it else it is deceptive. Further, if so, then the scope of the system of MPA's and MPA's themselves must be considered in light of that intent and implementation tempered by considerations such as those expressed in Parts 1 and 2 above.

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